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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB,
individually and as Representatives of
the Class of Reston, Virginia,
Homeowners,
Petitioners,

vs.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,
Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE BAR ASSOCIATION OF SAN FRANCISCO AS AMICUS CURIAE

E. ROBERT WALLACH
220 Bush Street
San Francisco, California 94104
President, Bar Association of San Francisco

WALTER J. ROBINSON
225 Bush Street
San Francisco, California 94104
Attorneys for Amicus Curiae,
Bar Association of San Francisco

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BRIEF FOR THE BAR ASSOCIATION OF SAN FRANCISCO AS AMICUS CURIAE

This brief is filed for the Bar Association of San Francisco, amicus curiae, with the written consent of all parties to this proceeding pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

The Bar Association of San Francisco is a nonprofit corporation organized under the laws of the State of California, each of whose more than 4,000 members is a member of the integrated bar of the State of California. The purposes, in part, of the Bar Association of San Francisco are:

> "To further the honor, dignity and public usefulness of the legal profession; to increase the profession's effectiveness in promoting the sound administration of justice; to act in the interest of maintaining a skilled, humane and independent judiciary; * * * to provide an organization for collective action or expression in matters germane to the aforesaid purposes."

The present case presents important issues concerning the relationship between the antitrust laws and professional conduct which will necessarily affect state and local bar associations and their members. The significance of the present case extends beyond the specific issues presented by the parties.

Amicus is particularly concerned about the effect of any decision by this Court on joint conduct by bar associations and their members. *Amicus* does not employ directly or indirectly any minimum fee schedule and does not urge that any such device is immunized from antitrust considerations simply because it is professionals who employ it. However, *amicus* has serious concern for the preservation of many activities which have historically been utilized by the organized bar to aid legitimate public interest—non-mercantile—objectives, including the providing of low-cost legal services to those unable to pay a competitive fee.

Thus, *amicus* presently operates a Lawyer Referral Service which helps to deliver legal services to persons who would not otherwise receive such services, including those unable to pay the regular fees charged by private practitioners. The Lawyer Referral Service and a number of other such Services throughout the country have already instituted, or contemplate, plans whereby legal representation is supplied to the needy at fixed token fees, such fees in all instances far below those regularly charged by private practitioners. In addition, legal aid organizations, prepaid legal services and other groups within the legal profession are also involved in the joint delivery of low-cost legal services. Many of these efforts involve, and indeed require, joint arrangements as to fees in order to miniminze the cost of legal services.

The concern of *amicus* is that this Court be aware of the full ramifications of any decision that the legal profession is to be subjected to the full scope of the Federal antitrust laws and treated as if it were in all respects a commercial business enterprise. Petitioner seeks to apply to the legal profession the *per se* proscription against price-fixing contained in section 1 of the Sherman Act (Petr.Br., p. 45). Such price-fixing proscriptions have been held to apply equally to maximum prices as to minimum (*Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211), and thus would endanger the extensive public interest fee-limiting plans by which legal services can be delivered at low cost to the needy through joint action of attorneys and bar associations. *Amicus* urges that any application of the Federal antitrust laws to the legal profession allow for proper professional obligations and standards, includ-

ing low-cost "maximum fee" plans. If such plans are not totally exempt, they should be reviewed only as to their reasonableness in light of proper professional objectives and state regulations.

QUESTION PRESENTED

Amicus will restrict its brief to the specific issue of whether, and to what extent, the restrictions of the Sherman Act should be applied to the legal profession and the ramifications of that application on the profession's efforts to deliver low-cost legal services.

SUMMARY OF ARGUMENT

The extensively state regulated and court supervised activities of the legal profession should not be subjected to the same antitrust considerations as commercial business activities. Professional and ethical considerations should be accommodated in reconciling the scope of the Federal antitrust laws to state regulation of professional activities. Such reconciliation should allow for review of the reasonableness of the professional regulation and deference to a state regulatory agency, at least as a matter of primary jurisdiction. The long-standing hesitancy to apply the full scope of the antitrust laws to legal and other professions further evidences the need for a reasoned analysis before enjoining professional action. Broad-brush, *per se* restrictions should be avoided in preference to examination of the reasonableness of specific professional activities. In particular, professional activities in

the public interest, many of which necessarily involve joint attorney agreements and participation, should either be exempted from antitrust considerations or at least subjected to analysis which weighs the benefits against any theoretical effect on competition.

ARGUMENT

I. SUBJECTING THE LEGAL PROFESSION'S JOINT ACTION TO THE FULL SCOPE OF THE ANTITRUST LAWS WOULD ENDANGER EFFORTS TO REDUCE FEES AND OTHERWISE SERVE THE PUBLIC.

The contentions of Petitioners and the Department of Justice as *amicus curiae* are postulated on their claim that by subjecting the legal profession, including bar associations, to the full scope of the Sherman Act the public interest will be served by necessarily reducing fees charged by lawyers (Petr.Br., pp. 43-44; Dept. of Justice Br., pp. 2-4, 12-19). On the contrary, unrestrained application of the Sherman Act would harm the legal profession and the public interest and frustrate, not aid, attempts to provide legal services at lower fees to those who cannot pay a competitive price for those services.

The delivery of low-cost legal services necessarily involves concerted action among members of the legal profession, as reflected in group legal services, prepaid legal services, legal aid organizations and lawyer referral services. The need for more extensive legal services to those unable to pay competitive rates has been previously noted by the Court (e.g., *Gideon v. Wainwright* (1963) 372 U.S. 335; *Argersinger v. Hamlin* (1972) 407 U.S. 25); that need

is at least in part being met by groups of attorneys and laymen combining to achieve low-cost services (*United Transportation Union v. Michigan Bar* (1971) 401 U.S. 576; *Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217. The duty of attorneys to provide such low-cost legal services is well-established (*United States v. Dillon* (9 Cir. 1965) 346 F.2d 633, certiorari denied (1966) 382 U.S. 978; Brennan, The Responsibilities of the Legal Profession, 54 A.B.A.Jour. (1968) p. 121; A.B.A. Code of Prof. Resp., Canon 2, EC 2-16).[1]

Thus, the Lawyer Referral Service performs its public function by providing that member-attorneys deliver a standard legal service (normally a one-half hour consultation) for a set fee, such as ten or fifteen dollars, well below the customary range of fees charged. Service at that fee is publicized and is available from all attorneys participating in the Referral Service (see Christensen, Lawyers for People of Moderate Means (1970), p. 175; Hearings before the Subcommittee on Representation of Citizen Interests of the Committee on the Judiciary, U.S. Senate, 93d Cong., 1st Sess., pp. 1618-1626, 1664-1679). It is estimated that more than 275 such referral services are in operation in the United States (American Bar Association, Lawyer Referral Service Bulletin, Spring 1973, p. 10). Additional programs involve participating attorneys' agreements to provide legal services to the indigent and

[1]It has been estimated that 30 million families whose incomes fall between $4,000 and $20,000 have been unable because of costs to receive proper legal advice (Denney, A New Idea for a Public Interest Law Institution, 60 A.B.A.Jour. (1974) 1252; Group Legal Services, 39 Cal.State Bar Jour. (1964) 639, 652-659).

nearly indigent at a minimal fixed fee (e.g., American Bar News, Vol. 19, No. 9 (1974) at 9).[2] Similarly, consumer sponsored prepaid legal services may also depend upon arrangements by which participating attorneys agree as to the fees to be charged, and thus provide some cost control to plans designed to minimize the cost of legal services (American Bar Association, Revised Handbook on Prepaid Legal Services (1972) pp. 67-68, 272; Meserve, Our Forgotten Client: The Average American, 57 A.B.A. Jour. (1971) 1092, 1093-1094).

The professional obligation of attorneys to provide legal services, recognized and enforced by the courts and subject to extensive state legislation, distinguishes the profession from ordinary commercial business entities. Such activities by the legal profession should not be restricted or eliminated by application of the Sherman Act or other Federal antitrust laws. The possibility of such an application has a necessarily chilling effect on the development of legal services plans and the delivery of legal services, thereby conflicting with First and Sixth Amendment rights (*United Transportation Union v. Michigan Bar* (1971) 401 U.S. 576, 580-586; *Mine Workers v. Illinois Bar Assn.* (1967) 389 U.S. 217, 221-225).

[2]Last year the Referral Service of *amicus* supplied counsel for approximately 7,500 individuals, a substantial portion of whom were persons of moderate means. As a part of its function, *amicus* has proposed to institute a public-interest program whereby individuals whose incomes are not more than 25% above Neighborhood Legal Assistance Foundation maximum limits would receive marital dissolutions or nonbusiness insolvency advice for a maximum fee of $200, well below the range of fees normally charged by private practitioners. Institution of such plan has been prevented due to speculation about the application of antitrust laws to public interest aspects of the legal profession.

II. THE FEDERAL ANTITRUST LAWS SHOULD NOT BE APPLIED TO THE LEGAL PROFESSION IN THE SAME MANNER AS THEY ARE APPLIED TO COMMERCIAL BUSINESS ORGANIZATIONS.

This Court and others have properly recognized that the professions should not be subjected to applications of the Federal antitrust laws in the same manner as commercial business enterprises:

> "We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession" (*United States v. Oregon Med. Soc.* (1952) 343 U.S. 326, 336).

Limitations have properly been placed on the extent to which courts have applied the antitrust laws outside normal commercial dealings:

> "The Court in *Apex* [*Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469] recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives" (*Klor's v. Broadway-Hale Stores* (1959) 359 U.S. 207, 213, n. 7).

The antitrust laws were "tailored * * * for the business world" (*Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 141), and the restraint of trade provisions of section 1 of the Sherman Act should be interpreted in light of the aims and objectives of that legislative purpose (*Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469, 489).

The proper reluctance to apply the full scope of the antitrust laws to all professional activities is reflected in the few cases in which courts have been asked to apply those antitrust laws to the professions (e.g., *Lincoln Rochester Trust Co. v. Freeman* (1974) 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480; *Marjorie Webster Jr. Col., v. Middle States Ass'n of C. & S. S.* (D.C.Cir. 1970) 432 F.2d 650, certiorari denied (1970) 400 U.S. 965; *Riggall v. Washington County Medical Society* (8 Cir. 1957) 249 F.2d 266, certiorari denied (1958) 355 U.S. 954; *Northern California Pharmaceutical Ass'n v. United States* (9 Cir. 1962) 306 F.2d 379, certiorari denied (1962) 371 U.S. 862).

III. THE HIGHLY REGULATED NATURE OF THE LEGAL PROFESSION SHOULD BE CONSIDERED IN ANY APPLICATION OF THE ANTITRUST LAWS; THE POLICIES BEHIND THAT REGULATION SHOULD BE CONSIDERED IN APPLYING THE ANTITRUST LAWS.

The highly regulated nature of the legal profession is undisputed (see, e.g., the State Bar Act, Cal.Bus.&Prof. Code, §§ 6,000, et seq.):

> "[T]he bulk of State Bar activities serve the function * * * of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy" (*Lathrop v. Donohue* (1961) 367 U.S. 820, 843).

Regulation under state statutes by state agencies and state courts should not be superseded by the antitrust laws. Rather, there should be reconciliation to the extent that the antitrust laws are to be applied to professional activities. Such extensive state regulation should be considered in applying the Sherman Act and should at least result in primary jurisdiction in appropriate cases for state agencies (*Industrial Communications Systems, Inc. v. Pacific Telephone & Telegraph Co.* (9 Cir. 1974) ..... F.2d ....., 1974 CCH Trade Cases, par. 75,291; see also *Ricci v. Chicago Mercantile Exchange* (1973) 409 U.S. 289, 306-308; *Far East Conf. v. United States* (1952) 342 U.S. 570; *Carter v. American Telephone & Telegraph Company* (5 Cir. 1966) 365 F.2d 486, 494-497, certiorari denied (1967) 385 U.S. 1008).

The proper reconciliation of the antitrust laws to state regulation of the legal profession demands a careful review of the professional objectives before overriding those objectives because of antitrust considerations:

> "Contrary to the conclusions reached by the courts below, the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted" (*Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 357).

This reconciliation can be best accomplished by reviewing the reasonableness of the professional activities at issue, not by applying broad *per se* rules (Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Colum.L.Rev. (1958) 673, 681-683, 701). Where extensive regulation is already present,

courts have properly reviewed the reasonableness of the challenged action.[3]

Because of the strong public interest supporting the vast proportion of the legal profession's standards and procedures, proscriptions of those activities should not occur until their reasonableness has been investigated (e.g., *White Motor Co. v. United States* (1963) 372 U.S. 253; *Worthen Bank & Trust Co. v. National Bankamericard Inc.* (8 Cir. 1973) 485 F.2d 119, 125-130, certiorari denied (1974) 415 U.S. 918). Specifically, where there is a proper public purpose, and little possibility of countervailing "competitive" injury or effect (as in bar association sponsored fee arrangements used to deliver low-cost legal services), such activities should be outside the scope of the Sherman Act.

Even the single case holding that the legal profession is subject to antitrust restriction clearly recognized the necessary role of the rule of reason in reconciling professional regulation with the antitrust laws (*United States v. Oregon State Bar* (D.Ore. 1974) ..... F.Supp. ....., Petr.Br., Ad B-17, 20; see also *United States v. National Society of Professional Engineers* (D.D.C. 1974) ..... F.Supp. ....., 1974 CCH Trade Cases, par. 75,415). To apply a *per se* rule in all cases where professional fees are involved would be improper, and would ignore the time honored professional obligations involved and the

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[3]*Silver v. New York Stock Exchange* (1963) 373 U.S. 341; *Deesen v. Professional Golfers' Association of America* (9 Cir. 1966) 358 F.2d 165, certiorari denied (1966) 385 U.S. 846; *United States v. Morgan* (S.D.N.Y. 1953) 118 F.Supp. 621; *United States v. Insurance Bd.* (N.D.Ohio 1960) 188 F.Supp. 949; *United States v. United States Trotting Ass'n* (S.D.Ohio 1960) 1960 CCH Trade Cases, par. 69,761.

lack of improper purpose or effect in such areas as the delivery of low-cost legal services. Rather, such public interest activities insure the right of citizens to counsel and access to the courts, and should be either exempted from the Sherman Act *(Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 137-138) or should be tested by the traditional rule of reason, determining whether any theoretical restraint is ancillary to proper professional and public interest objectives (e.g., *Chicago Board of Trade v. United States* (1918) 246 U.S. 231, 238; *United States v. Morgan* (S.D. N.Y. 1953) 118 F.Supp. 621, 689).

The opportunity for professional organizations to render public service should be protected by this Court. Thus, if the Court should determine that lawyers' minimum fee schedules cannot withstand antitrust scrutiny, this result can be accomplished while yet preserving public service programs by exempting those activities which are wholly or primarily designed to provide benefits to clients or the public generally. Later cases can, by application of traditional rules, determine whether particular activities serve the public interest and are designed to serve professional concerns, rather than economic self-interest.

As noted by the Court in *Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 360, "under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the * * * [conflicting regulation]." Any application of the antitrust laws must allow proper flexibility for accommodating professional standards and responsibilities *(Lincoln Rochester Trust Co. v. Freeman* (1974) 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480).

CONCLUSION

The question of the application of the antitrust laws to the legal profession is one of first impression. Any decision subjecting the legal profession to the requirements of the Sherman Act and other Federal antitrust legislation should consider the possible effect on public interest delivery of low-cost legal services. The standard to be applied should be flexible enough to accommodate legitimate objectives of professional action and regulations.

Respectfully submitted,

E. Robert Wallach
President, Bar Association of San Francisco
Walter J. Robinson
Attorneys for Amicus Curiae,
Bar Association of San Francisco